FILE COPY

Office Supreme Court, U.S.
FILED
MAY 4 1950
JAMES R. BROWNING, Clerk

IN THE

Supreme Court Of The United States

No. 833

M. MELINDA BERRY, Administratrix of the Estate of Robert H. Berry, Deceased, Petitioner,

Versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, and CAROLINA POWER & LIGHT COMPANY, a Corporation, Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID W. ROBINSON, II
Of Counsel

DAVID W. ROBINSON
Columbia, South Carolina
A. Y. ARLEDGE
Raleigh, North Carolina
A. L. HARDEE
Florence, South Carolina
Attorneys for Respondents

THE STATE COMMERCIAL PRINTING CO.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATEMENT	2
ARGUMENT	
I. The petition is based upon grounds not properly raised, litigated or passed upon below	3
II. Certiorari does not lie to review the evidence	4
III. In concluding that the motion for a summary judgment was properly granted, the Court of Appeals did not apply a rule in regard to the sufficiency of the evidence different from that established by the South Carolina decisions	5
IV. Under the Seventh Amendment, the scintilla rule is not applicable in Federal diversity cases	8
V. The Circuit Court complied in all respects with the requirements of the Seventh Amendment of the United States Constitution	10

IN THE

Supreme Court Of The United States

M. MELINDA BERRY, Administratrix of the Estate of Robert H. Berry, Deceased, Petitioner,

Versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, and CAROLINA POWER & LIGHT COMPANY, a Corporation, Respondents

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinion of the District Court (App. 33) was not reported. The Opinion of the Court of Appeals is reported as *Berry v. Atlantic Coast Line Railroad Company, et al.*, 273 F. 2d 572 (App. 19).

JURISDICTION

The jurisdictional requisites are stated in the Petition.

QUESTIONS PRESENTED

I. The petition is based upon grounds not properly raised, litigated or passed upon below.

II. Certiorari does not lie to review the evidence.

III. In concluding that the motion for a summary judgment was properly granted, the Court of Appeals did

not apply a rule in regard to the sufficiency of the evidence different from that established by the South Carolina decisions.

IV. Under the Seventh Amendment, the scintilla rule is not applicable in Federal diversity cases.

V. The Circuit Court complied in all respects with the requirements of the Seventh Amendment of the United States Constitution.

STATEMENT

Robert H. Berry, an employee of Wilhoit Steel Erectors, was electrocuted when a crane operated by Calvin Berry, a brother and fellow employee, tilted into a transmission line of the defendant, Carolina Power & Light Company, while unloading steel from a gondola car on a siding of the defendant Atlantic Coast Line Railroad Company. This action was brought by his administratrix for her benefit and for the benefit of the St. Paul Mercury Indemnity Company, Wilhoit's Workmen's Compensation carrier.

The two Berry brothers, as the sole employees of Wilhoit present, were in charge of the unloading operation. They were assisted by help furnished by Vulcraft, the consignee of the steel. No employee of either defendant was present. According to the plaintiff's theory, Atlantic Coast Line was negligent in building the siding too close to the power line and in spotting a car on this siding which would be unloaded by the use of a crane. Carolina was negligent, she says, because it allowed the line to remain after the siding was built.

There is no dispute as to the facts. At the point where the crane touched the power line, the line was 28 feet 3 inches above the ground, whereas the South Carolina Public Service Commission's safety regulation provided for an elevation of not less than 20 feet. The distance on the ground from the near rail to a point under the nearest wire was 27 feet 8.4 inches, whereas the Commission's regulation requires only seven feet. App. 22-23.

Calvin Berry, the surviving brother, in his deposition and in his written statement disclosed that he saw the power line and recognized the danger of contact. While he shortened the boom of the crane to minimize the danger, he used only two of four available stabilizing outriggers and decided not to position the truck alongside the gondola which would have rendered negligible the chance of contact. He could have but did not ask that the current be cut off. These omissions on the part of the Berry brothers were the cause of the death of the intestate. App. 25-26. The record fails to show any actionable negligence on the part of either defendant.

In requesting a writ of certiorari, petitioner charges that the Court of Appeals violated the doctrine of *Erie v. Tompkins* in that it failed to follow the state "scintilla" rule in determining the sufficiency of the evidence and invaded the province of the jury contrary to the Seventh Amendment of the United States Constitution. The writ should not be granted for the following reasons: (1) The grounds of the Petition were not properly raised below; (2) this Court does not grant certiorari for the sole purpose of reviewing the evidence; (3) the Circuit Court applied the law of South Carolina in determining the sufficiency of the evidence; (4) the scintilla rule is not applicable in the federal courts; and (5) the Circuit Court complied in all respects with the requirements of the Seventh Amendment.

ARGUMENT

I

The petition is based upon grounds not properly raised, litigated or passed upon below.

The petitioner states as her reasons for granting the writ, a violation of the doctrine of *Erie v. Tompkins*, 304 U.S. 64, and an invasion of the province of the jury, contrary to the Seventh Amendment of the United States Constitution by the Circuit Court. Petition, p. 7, 13. Neither of these positions was presented by brief or oral argument

in the lower Courts.[1] This Court has consistently held that the writ of certiorari will not issue upon grounds not properly raised, litigated, or passed upon below, and therefore not adequately supported by the record. *Cleveland v. U. S.*, 323 U.S. 329; *Helvering v. Minn. Tea Co.*, 296 U.S. 378.

II

Certiorari does not lie to review the evidence.

This case involves no more than the application of the undisputed law of South Carolina to the uncontroverted facts before the Court. The District Court and the Court of Appeals concur in the result. Under such circumstances, this Court will not review the evidence presented.

> Granting the writ would not be warranted merely to review the evidence or inferences drawn from it . . . [Citations omitted.] . . . Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *General Talking Pictures Corp. v. Western Electric Company*, 304 U. S. 175, 178.

Southern Power Co. v. N. C. Public Service Commission, 263 U.S. 508; *U.S. v. James J. Johnson*, 268 U.S. 220; *Houston Oil Company v. Goodrich*, 245 U.S. 440; *Grace*

[1] In her "reasons for granting the writ" petitioner charges only the Court of Appeals with these errors. Petition, p. 7, 14. The Circuit Court simply affirmed the judgment of the District Court. Therefore these same objections were available for petitioner's appeal to the Circuit Court, but were not raised. In her "questions involved" petitioner recognizes this distinction. Petition, p. 2, 3.

The only questions raised in petitioner's appeal to the Fourth Circuit involved a review of the evidence. The argument headings in her brief there were:

> 1. Appellee Carolina Power & Light Company was guilty of actionable negligence in that after acquiring knowledge of the presence of the railroad side track in close proximity to its high voltage uninsulated power line it (1) did nothing to obtain a relocation of the electric power line or railroad side track, (2) did nothing to insulate its high voltage wires which ran in close proximity to the side track, and (3) did nothing to give notice of the nature, kind, or dangerous character of its high voltage wires located in close proximity to the side track.
>
> 2. Appellee Atlantic Coast Line Railroad Company was guilty of actionable negligence in that (1) it constructed and maintained a side track in close proximity to a high voltage, uninsulated electric power line and (2) parked in close proximity to this high voltage, uninsulated electric power line the carload of steel for unloading by a crane

Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271. Especially is this rule applicable to a diversity case involving no issue of Federal law. *Magnum Co. v. Coty*, 262 U.S. 159, 163; *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (Frankfurter dissenting).

III

In concluding that the motion for summary judgment was properly granted, the Court of Appeals did not apply a rule in regard to the sufficiency of the evidence different from that established by the South Carolina decisions.

The Fourth Circuit followed the law of South Carolina in determining the sufficiency of the evidence when it concluded that the summary judgment record contained no evidence of actionable negligence by the respondents.[1] On the part of the Power Company, it said:

> We are of the opinion that there is nothing in the record to indicate that the Power Company failed to comply with its duty to exercise a very high degree of care. Appendix, p. 25.

In regard to the Railroad Company it concluded:

> We cannot say that the existence of a power line some 27 or 28 feet from the siding was an unsafe condition known to the Railroad Company. The actual distance from the near rail of the siding to a point on the ground immediately under the power line was approximately four times the minimum distance required by the rules and regulations of the Public Service Commission. The available space would indicate to a person of ordinary prudence that a crane could be used without danger. Appendix, page 31.

This is the exact test which petitioner contends should have been applied. Petition, p. 7. Under the South Carolina

[1] Even though it applied the South Carolina scintilla rule in determining the sufficiency of the evidence in granting the summary judgment against the petitioner, after concluding that no dispute existed as to the facts, the Circuit Court committed no reversible error since the Federal Rule, hereafter set forth, is less favorable to petitioner's position.

law, the Circuit Court having concluded that the record contained no evidence of negligence, there was no issue to submit to a jury under the scintilla rule.

Nor did the Circuit Court err in its application of the law of South Carolina to the undisputed facts of this action. In her petition, petitioner ignores her original burden of proving the existence of negligence and apparently would have respondents prove conclusively that they were *not negligent* in order to sustain the summary judgment. She urges that respondents' ample compliance with the safety regulations of the South Carolina Public Service Commission are not conclusive of the negligence issue. Yet the record contains no evidence that the standards met by the respondents were short of that degree of due care required of them under the existing circumstances. Undoubtedly had the facilities of either of the respondents not been located in the area, the unfortunate accident would not have occurred. But that is not the issue. Both were there under proper right and title and unless there is some evidence that they failed to exercise due care, they were not negligent.[3]

The record contains no evidence that the respondents' facilities constituted any danger to persons normally using the railroad facilities or in the area in the ordinary course of business or pleasure. The petitioner's deceased son and his brother, the crane operator, were fully appraised of the existence of these facilities and any danger they might have created to their particular operation. In fact, the undisputed evidence shows that their negligence, in failing to take the customary precautions, was the sole proximate cause of the accident. Appendix, p. 25, 31.

Finally, petitioner argues that the Fourth Circuit applied a test of foreseeability in regard to the Power Company different from that which prevails in South Carolina. As stated in its opinion, the Circuit Court applied the test of

> . . . whether it [the Power Company] should have foreseen the probability that injury might result from any reasonable action or conduct by people in dangerous

[3] The doctrine of *res ipsa loquitur* does not exist in South Carolina. *Daniels v. Timmons*, 233 S.C. 524, 89 S.E. 2d 129, cert. denied 349 U.S. 841.

> proximity to its high voltage line. [Citations omitted.] The law requires only reasonable foresight and when the injury complained of is not reasonably foreseeable in the exercise of due care there is no liability. One is not charged with foreseeing that which could not reasonably be expected to happen. Appendix, p. 25 [citation omitted].

and concluded that

> . . . This conduct on the part of Calvin Berry [the crane operator and brother of the deceased] is beyond the realm of reasonable foreseeability. Appendix, p. 26. [Phrases added.]

The South Carolina test in this regard is identical with that followed by the Circuit Court and is defined in *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E. 2d 121, 125, 126 (1943), where the plaintiff was injured when his car hit a high tension wire sagging across the highway. Minutes earlier another driver had negligently driven off the road and hit the pole previously supporting this sagging wire. The South Carolina Supreme Court freed the Power Company from liability even though it might have been negligent in the construction of its span across the highway.

> The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably have foreseen and anticipated them in light of the attendant circumstances. The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable and that which could not be expected to happen. [Citations omitted.]

See also *Elliott v. Black River Electric Co-op*, 233 S.C. 233, 104 S.E. 2d 357 (1958); *Ayers v. Atlantic Greyhound Corporation*, 208 S.C. 267, 37 S.E. 2d 737 (1946); *Hunter v. Boyd*, 203 S.C. 518, 28 S.E. 2d 413 (1943); *Pfaehler v.*

Ten Cent Taxi Co., 198 S.C. 476, 18 S.E. 2d 331 (1942); *Driggers v. The City of Florence*, 190 S.C. 209, 2 S.E. 2d 790 (1939).

The Circuit Court in affirming the decision of the District Court properly followed all phases of the South Carolina law, as directed by *Erie v. Tompkins*. Therefore, the only purpose to be served by the allowance of the petition would be a review of the evidence by this Court to determine the correctness of the Circuit Court's application of the State law to the undisputed facts and a further opportunity for the petitioner to be heard. This Court does not normally undertake these responsibilities.

IV

Under the Seventh Amendment, the scintilla rule is not applicable in Federal diversity cases.

Assuming that the "scintilla" rule, as defined by petitioner,[4] is applicable in South Carolina and that the Fourth Circuit failed to follow the South Carolina practice, which is denied, it is clear that the Federal Courts are in complete agreement that, under the doctrine of *Erie v. Tompkins*, 304 U.S. 64, the scintilla rule of evidence is not applicable in the decision of diversity cases.[5]

A state requirement that certain questions be left to the jury is not binding on a Federal Court in diversity actions in *Herron v. Southern Pacific Company*, 283 U.S. 91.

This doctrine was recently reaffirmed in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, and *Magenau v. Aetna Freight Line*, 360 U.S. 273, when this Court held that the converse of the above rule held true in spite of *Erie v. Tompkins*—that state practices requiring the determination of certain factual questions by the judge are not applicable to Federal Courts in diversity cases.

[4] Under *scintilla* the rule in South Carolina is that "if there *is any testimony whatsoever* to go to the jury on an issue involved in a cause" the case must be submitted to the jury. Petition, p. 7.

[5] In discussing this issue, respondents have assumed that in determining the sufficiency of the evidence for purposes of granting a summary judgment the test is the same as that applied in ruling upon a motion for directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 621, 6 Moore's Federal Practice, 2d Ed., 2032, 2101, Section 56.04[2] 56.15[1].

The aim of the Seventh Amendment is to preserve the substance of the common law rule of trial by jury and particularly to retain the common law distinction between the province of the Court and that of the jury. *Baltimore and Carolina Line v. Redmon*, 295 U.S. 654. The common law province of the trial judge, in determining what issues should be left to the jury, was defined by this Court in *Gunning v. Cooley*, 281 U.S. 90, as follows:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. In decisions establishing a more reasonable rule "that in every case, before the evidence is left to a jury, there is a preliminary question for the judge, not whether there is really no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Schuylkil & Prov. and R. Co. v. Munson*, 14 Wall. 442, 448, 20 Law Ed. 867, 872; *Pleasants v. Fant*, 22 Wall. 116, 122, 22 Law Ed. 780, 783.
>
> * * * * *
>
> Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury.

Nor are the opinions and practices of the Circuit Courts in conflict on this issue. They have consistently avoided the application of a "scintilla" rule in diversity cases.[*] None of the cases cited in footnote 4 on page 8 of

[*] Second Circuit: *Moore v. American Scantic Line*, 121 F. 2d 767; *Kvaro v. Swedish-American Lines*, 126 F. 2d 279.
Fourth Circuit: *Ralston Purina Co. v. Edmunds*, 241 F. 2d 164, cert. den. 335 U.S. 974.
Fifth Circuit: *Reuter v. Eastern Air Lines*, 226 F. 2d 443.
Sixth Circuit: *Commercial Casualty Co. v. Stinson*, 124 F. 2d 63; *Lovas v. General Motors Corporation*, 212 F. 2d 805.
Seventh Circuit: *Burg v. The Great Atlantic & Pacific Tea Co.*, 256 F. 2d 613; *Reitan v. Travelers Indemnity Co.*, 267 F. 2d 66.
Eighth Circuit: *Mounds Park Hospital v. Von Nye*, 245 F. 2d 756.
Ninth Circuit: *Trade Wind Transportation Co. v. Taylor*, 267 F. 2d 185; *Hawley v. Alaska Steamship Line*, 236 F. 2d 307.
Tenth Circuit: *Commercial Standard Insurance Company v. Foster*, 259 F. 2d 210.
D.C. Circuit: *Murray v. Towe*, 239 F. 2d 91; *Boland v. Love*, 222 F. 2d 27.

petitioner's petition as following "state test" involve the application of the "scintilla" rule.[1] Counsel for the respondents have been unable to find any Federal diversity case, since the decision in *Erie v. Tompkins*, in which such a measure of the sufficiency of the evidence was applied.

Admittedly, under the Erie doctrine, a Federal Court, in determining whether to submit issues to the jury, must determine whether under the applicable state decisions a cause of action has been proved. However, in determining whether there is sufficient evidence to create a factual issue to be resolved by a Federal jury, the Federal judge is first obligated to determine that there is sufficient evidence, as required by the Seventh Amendment, to support a jury verdict. Otherwise, if he were bound by petitioner's "scintilla" rule, a Federal District Judge is no more than a "monitor" of the court room and is no longer fulfilling his proper function in a Federal Court, an essential factor in the jury trial process for which the Constitution provides. Under the consistent opinions of this Court and the Circuit Courts, a state "scintilla" rule as defined by petitioner is not applicable in Federal diversity cases.

V.

The Circuit Court complied in all respects with the requirements of the Seventh Amendment of the United States Constitution.

This Court has frequently held that the requirements of the Seventh Amendment do not prevent a Federal trial

[1] *Lovas v. General Motors Corp.*, 212 F. 2d 805 (6th Cir. 1954), noting that a mere scintilla of evidence was not enough to submit the case to the jury.

Rowe v. Pennsylvania Greyhound Corp., 231 F. 2d 922 (2nd Cir. 1956), following the New York rule on sufficiency of the evidence, which required more than a mere scintilla of evidence.

Cooper v. Brown, 126 F. 2d 874 (3rd Cir. 1942), a non-jury case in which more than a scintilla of evidence was involved.

Rytex Co. v. Ryan, 126 F. 2d 952 (7th Cir. 1942), looking to the state substantive law to determine what constitutes unfair competition in affirming the dismissal of the complaint on a test involving more than a scintilla of evidence.

Clay Co. Cotton Co. v. Home Life Ins. Co., 113 F. 2d 856 (4th Cir. 1942), applying state substantive law, where the question of sufficiency of the evidence involved more than a mere scintilla.

judge from removing a case from a jury's province under the proper circumstances. *Galloway v. United States*, 319 U.S. 372; *North Penn. RR Co. v. Commercial National Bank of Chicago*, 123 U.S. 727. As stated by Justice Brandeis in *Matter of Peterson*, 253 U.S. 300:

> No one is entitled in a civil case to a trial by jury unless and except so far as there are issues of fact to be determined. Page 310.

As heretofore indicated the record in this case presents no issue of fact. The parties are in complete agreement on the circumstances of the accident and no conflict in the reasonable inferences to be drawn from these facts exists. Under such circumstances this Court has directed that it is a function of the trial judge alone to dispose of the case. *Chesapeake & Ohio RR Co. v. Martin*, 283 U.S. 209; *Atchison, Topeka & Santa Fe RR v. Toops*, 281 U.S. 351; *Gunning v. Cooley*, 281 U.S. 90; 5 Moore 2d Ed. 83, 2313-Sections 38.8[5], 50.02. Furthermore the use of the summary judgment process is proper in disposing of a case under such circumstances. That use is in no way an infringement upon the rights guaranteed by the Seventh Amendment. *Fidelity & Deposit Co. v. U.S.*, 187 U.S. 315; 6 Moore 2d Ed. 2037-2042, Section 56.06.

By terming certain issues as "mixed questions of law and fact" petitioner apparently contends that the Seventh Amendment requires that all *negligence* actions be submitted to a jury, even though no factual issue may exist. The sufficiency of evidence in negligence cases, as in any other actions, is first a question for the trial judge. *Phoenix Ins. Co. v. Doster*, 106 U.S. 30, 32; *Griggs v. Houston*, 104 U.S. 553; *Randall v. Baltimore & Ohio RR Co.*, 109 U.S. 478, 482; *Anderson Co. Commissioners v. Beal*, 113 U.S. 227, 241; *Schofield v. Chicago M. & St. P. R. Co.*, 114 U.S. 615, 618. *Delaware, Lackawana & Western RR v. Converse*, 139 U.S. 469, 472.

Other Circuit Courts have followed this test in granting summary judgments in cases involving issues of negli-

gence.[8] Thus it is clear that the action of the Fourth Circuit constituted no invasion of the province of the jury as defined by the Seventh Amendment.[9]

---

[8] *Baggert v. Union Pacific RR Co.*, 240 F. 2d 207 (8th Cir. 1957); *Surkin v. Charteris*, 197 F. 2d 77 (5th Cir. 1952); *American Air Lines v. Ulen*, 186 F. 2d 529 (D.C. Cir. 1949); *Thomas v. Furness (Pac.) Limited*, 171 F. 2d 434 (9th Cir. 1948); *Wilkinson v. Powell*, 149 F. 2d 335 (5th Cir. 1945).

[9] In this regard the petition raises the same question passed upon by this Court in December 1959. *Manaia v. Potomac Elec. Power Co.*, 268 F. 2d 793, 798, 799 (4th Cir. 1959), cert. denied ____ U.S. ____, 4 Law Ed. 183 (1959) (Supreme Court Docket No. 397).